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No. ___

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Petitioner,

v.

ELEANOR T. JOHNSON and FRANKLIN D. JOHNSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GERARD J. STIEF
Associate General Counsel
Counsel of Record

BRUCE P. HEPPEN
Assistant General Counsel

FREDRIC SCHUSTER
Assistant General Counsel

ROBERT J. KNIAZ
Acting Deputy General Counsel

ROBERT L. POLK
General Counsel

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY
600 Fifth Street, N.W.
Washington, D.C. 20001
(202) 962-2569

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

1. Whether the District of Columbia Circuit abrogated WMATA's sovereign immunity by failing to apply District of Columbia Court of Appeals precedent, as required by the Compact, regarding the last clear chance exception to the contributory negligence doctrine?

2. Whether the WMATA Compact precludes a court from scrutinizing WMATA's selection of employee drug tests, thereby exposing WMATA to liability in a tort action for its failure to adopt more extensive testing, in violation of WMATA's sovereign immunity and in conflict with a negotiated labor agreement?

3. Whether the District of Columbia Circuit, in reversing a grant of summary judgment, violated the principles established by this Court's decisions in *Anderson* and *Matsushita Electric*, by failing to consider all the evidence in the record in determining whether there is sufficient evidence upon which a jury could properly hold WMATA liable?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTES	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. WMATA's Sovereign Immunity, Under Its Interstate Compact, And The Clear Terms Of The Compact Have Been Abrogated By The Failure Of The Court Below To Apply The Common Law Of The District Of Columbia On The Last Clear Chance Doctrine	5
II. The WMATA Compact Precludes Judicial Review, In A Common Law Tort Action, Of The Adequacy Of WMATA's Drug Testing	9
A. Introduction	9
B. A Court May Not Hold WMATA Liable On The Basis Of The Elements Of Its Drug Testing Program, A Governmental Decision Reserved To It Under The Compact	11
C. The Compact's Labor Relations Article Pre-Empts Any Finding Of Negligence Based On The Failure To Conduct Neurological Testing	14
III. Supreme Court Review Is Required Because The District Of Columbia Circuit Failed To Follow This Court's Holdings In *Anderson* and *Matsushita*, Which Require Review Of The Entire Record	16
CONCLUSION	21

APPENDICES

APPENDIX A

Johnson v. WMATA - Decision of the United States Court of Appeals for the District of Columbia Circuit, August 22, 1989 ..... 1a

APPENDIX B

Johnson v. WMATA - Memorandum of the District Court for the District of Columbia, Filed February 5, 1988 ..... 14a

APPENDIX C

Johnson v. WMATA - Order of the District Court for the District of Columbia, Filed January 27, 1988 ..... 31a

APPENDIX D

Johnson v. WMATA - Judgment of the United States Court of Appeals for the District of Columbia Circuit, August 22, 1989 ..... 33a

APPENDIX E

Johnson v. WMATA - Order of the United States Court of Appeals for the District of Columbia Circuit denying Petition for Rehearing, October 18, 1989 ..... 35a

APPENDIX F

Johnson v. WMATA - Order of the United States Court of Appeals for the District of Columbia Circuit denying Suggestion for Rehearing *En Banc*, October 18, 1989 ..... 37a

APPENDIX G

Extracts from WMATA Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966), *codified at* D.C. Code Ann. § 1-2431 ..... 39a

APPENDIX H

Extracts from the Record Below: Substance Abuse Policy and Employee Assistance Program 45a

TABLE OF AUTHORITIES

Cases	Page
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)	15
Amalgamated Transit Union v. Skinner, No. 88-3642 (D.D.C., Sept. 22, 1989), *appeal pending*, No. 89-5380 (D.C. Cir.)	12
Anderson v. Liberty Lobby, 477 U.S. 242 (1986)	16,17,20,21
Bowman v. Redding & Co., 449 F.2d 956 (D.C. Cir. 1971)	9
Brady v. Southern Railway Co., 320 U.S. 476 (1943)	20
Byrd v. Hawkins, 404 A.2d 941 (D.C. 1979)	8,9
Cuyler v. Adams, 449 U.S. 433 (1981)	7
Dant v. District of Columbia, 829 F.2d 69 (D.C. Cir. 1987)	12
Dean v. Century Motors, 154 F.2d 201 (D.C. Cir. 1946)	8
Drapaniotis v. Franklin, 504 F.2d 236 (D.C. Cir. 1974)	9
Felton v. Wagner, 512 A.2d 291 (D.C. 1986)	7,8,9,11,21
Galloway v. United States, 319 U.S. 372 (1943)	20
Golden State Transit Corp. v. City of Los Angeles, ___ U.S. ___, 110 S. Ct. 444 (1989)	15
Holland v. Baltimore & O.R.R., 431 A.2d 597 (D.C. 1981)	9
Library of Congress v. Shaw, 478 U.S. 310 (1986)	12
Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1972)	15
Lovelace v. Sherwin Williams Co., 681 F.2d 230 (4th Cir. 1982)	20

Table of Authorities Continued

	Page
Martin v. WMATA, 667 F.2d 435 (4th Cir. 1981)	13
Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	16,17,21
Morris v. WMATA, 781 F.2d 218 (D.C. Cir. 1986)	5,13
National Federation of Federal Employees v. Carlucci, 680 F. Supp. 416 (D.D.C. 1988), *aff'd in part, rev'd in part*, 884 F.2d 603 (D.C. Cir. 1989)	10
Office and Professional Employees International Union, Local 2 v. WMATA, 724 F.2d 133 (D.C. Cir. 1983)	14
Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959)	7
Phillips v. D.C. Transit Corp., 198 A.2d 740 (D.C. 1964)	8
Purnell v. Southall Realty, 416 U.S. 363 (1974)	8
Queen v. WMATA, 842 F.2d 476 (D.C. Cir. 1988)	8
Richardson v. Richardson-Merrell, Inc., 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 218 (1989)	20
Sanders v. WMATA, 819 F.2d 1151 (D.C. Cir. 1987)	12,13,14
Skinner v. Railway Labor Executives' Association, 489 U.S. ___, 109 S. Ct. 1402 (1989)	11,13
Texas v. New Mexico, 462 U.S. 554 (1978)	7
WMATA v. Johnson, 467 U.S. 925 (1984)	5

Table of Authorities Continued

Page

STATUTES:

28 U.S.C. § 1254(1) 2
D.C. Code Ann. § 1-2431 2
D.C. Code Ann. §§ 11-921 2
D.C. Code Ann. § 13-423(a)(3) 2

WMATA Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966), *codified at* D.C. Code Ann. § 1-2431

Section 12(g) 15
Section 66 14
Section 80 5,11,12,14,21

REGULATORY MATERIAL:

49 C.F.R. Part 653 (1989 ed.) 12
53 Fed. Reg. 47004 (1988) 12
53 Fed. Reg. 47155 (1988) 12

MISCELLANEOUS:

Gardner, *The Perception and Memory of Witnesses*, 18 Cornell L.Q. 391 (1933) 19
McBay, *Efficient Drug Testing: Addressing the Basic Issues*, 11 NOVA L. Rev. 647 (1987) 10

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ELEANOR T. JOHNSON and FRANKLIN D. JOHNSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Washington Metropolitan Area Transit Authority respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the District of Columbia Circuit is reported at 883 F.2d 125 and is reprinted in the appendix hereto, p. 1a, *infra*.

The memorandum decision of the United States District Court for the District of Columbia (Oberdorfer, D.J.) has not been reported, and is reprinted at p. 14a, *infra*.

JURISDICTION

Respondents originally brought this suit in the Superior Court of the District of Columbia, alleging jurisdiction under D.C. Code Ann. §§ 11-921 and 13-423(a)(3). This case was removed by the Washington Metropolitan Area Transit Authority (WMATA) to the United States District Court for the District of Columbia, pursuant to § 81, Pub. L. No. 89-774, and § 4 of the accompanying consent legislation, reprinted at D.C. Code Ann. §§ 1-2431 and 1-2439, which confer federal district court jurisdiction to hear this case. On January 27, 1988, the district court granted WMATA's motion for summary judgment and dismissed the complaint. *See* p. 31a, *infra*. A memorandum order was filed by the district court on February 5, 1988. *See* p. 14a, *infra*.

On respondents' appeal, the District of Columbia Circuit on August 22, 1989 entered a judgment and opinion partially reversing the district court's order, directing that summary judgment was premature and remanding for further proceedings. Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* were denied on October 18, 1989. *See* p. 35a and p. 37a, *infra*. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

RELEVANT STATUTES

Relevant sections of the Washington Metropolitan Area Transit Authority Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966), *codified at* D.C. Code Ann. § 1-2431, are set forth in the appendix. *See* pp. 39a - 44a, *infra*.

STATEMENT OF THE CASE

Petitioner operates a rapid transit metrorail system in the Washington, D.C. metropolitan area. On March 20, 1986, Devora Johnson committed suicide by jumping in front of a Metrorail train traveling between 23 and 42 feet per second, when it was no more than 20 feet from where she stood on the platform at the Metro Center station in the District of Columbia. Several cars of the train were already in the station when she jumped. The operator of the train instantly hit the emergency button to stop the train. All the witnesses deposed by the parties stated that the operator could not have stopped the train in time to avoid hitting her.

A urinalysis test of the train operator was performed following the accident to determine if there was evidence of a violation of WMATA's substance abuse policy. The train operator tested positive. It is undisputed that such testing conveys no information concerning whether the train operator, Mr. Dixon, was impaired or in any way under the influence of drugs at the time of the accident, as the tests give no information concerning recency of drug use. Uncontradicted eyewitness observations of Mr. Dixon by experienced police officers at the scene indicated that Mr. Dixon did not display any behavioral indications of impairment.

The Decisions Below

Respondents brought this action seeking recovery against WMATA for its alleged negligence in failing to prevent their daughter from intentionally taking her own life. The district court granted WMATA summary judgment, holding that (1) "no reasonable juror

could fail to conclude that . . . decedent proximately caused her own death by jumping in front of the oncoming train when it was no more than 20 feet away from her, and that it would have been impossible for defendant or the operator, irrespective of any impairment from drug use, to stop the train after she jumped onto the track and before the train struck her," *see* p. 22a, *infra*; (2) there was no evidence that the operator's reactions were impaired; and (3) since it was physically impossible for the operator to stop the train before it struck decedent, the doctrine of last clear chance was not available to respondents.

On appeal, the District of Columbia Circuit reversed the district court, holding that there was a genuine issue of material fact, which precluded granting the motion, as to whether the train could have been stopped in time to avoid hitting decedent. The court below did hold that since decedent was a trespasser, WMATA can only be liable if respondents can establish wanton or willful misconduct by WMATA. Although the District of Columbia Circuit recognized that urinalysis testing does not indicate impairment, it held that on remand the district court must review the admissibility of the results of the drug test which was conducted. It directed that in deciding the issue, the district court must consider WMATA's failure to conduct more extensive "neurological testing." The District of Columbia Circuit remanded for further consideration whether WMATA had the "last clear chance" to avoid the accident. However, the court rejected the formulation of that doctrine enunciated by the District of Columbia Court of Appeals and required by the WMATA Compact, and instead re-

manded in light of its own formulation of that doctrine.

WMATA timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. By Orders dated October 18, 1989 (pp. 35a and 37a, *infra*), the District of Columbia Circuit denied the Petition and Suggestion. District Judge Hogan, sitting by designation, voted to grant the Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I. WMATA'S SOVEREIGN IMMUNITY, UNDER ITS INTERSTATE COMPACT, AND THE CLEAR TERMS OF THE COMPACT HAVE BEEN ABROGATED BY THE FAILURE OF THE COURT BELOW TO APPLY THE COMMON LAW OF THE DISTRICT OF COLUMBIA ON THE LAST CLEAR CHANCE DOCTRINE.

WMATA is an interstate governmental agency created by an interstate Compact among the District of Columbia, Virginia and Maryland with the consent and active participation of Congress. *WMATA v. Johnson*, 467 U.S. 925, 927 (1984). WMATA is entitled to sovereign immunity comparable to that of a state, except to the extent that sovereign immunity is waived by Section 80 of the Compact. *See* p. 43a, *infra*; *see also Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986).

The substantive rule of law governing WMATA's tort liability when performing a proprietary function is determined by Section 80 of the Compact which provides:

> The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with

> the law of the applicable signatory (including rules on conflict of laws), but *shall not be liable for any torts occurring in the performance of a governmental function.* The exclusive remedy for such breach of contracts and torts for which the Authority *shall be liable*, as herein provided, shall be by suit against the Authority. . . . (emphasis added).

The decision below conflicts with a controlling decision of the District of Columbia Court of Appeals which enunciated the doctrine of last clear chance[1] and with the rules which govern development of the common law of the District of Columbia. As such the decision expands WMATA's liability beyond the bounds contemplated by the limited waiver of sovereign immunity in clear violation of the terms of the Compact.

This Court has a special role in interpreting interstate compacts such as the WMATA Compact. *See*

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[1] Last clear chance is an exception to the rule applied by the District of Columbia, that the decedent's contributory negligence is a complete bar to recovery. Here, plaintiffs must prove that WMATA committed wanton and willful negligence, by failing to stop the train in time. Among WMATA's defenses is the affirmative defense that notwithstanding the question of whether the train could have been stopped in time, decedent was contributorily negligent by virtue of intentionally jumping in front of a known danger, a Metrorail train. Plaintiffs then invoked the doctrine of "last clear chance" which, if applicable, may overcome the contributory negligence bar. Contrary to the decision below, under District of Columbia law this doctrine can only be invoked if the decedent was initially placed in a position of peril through the primary negligence of the defendant. *See infra*, p. 7. As both courts below rejected plaintiffs' claims concerning WMATA's primary negligence, *see* p. 4a, p. 26a, *infra*, WMATA is entitled to summary judgment on this basis.

Cuyler v. Adams, 449 U.S. 433 (1981). "The construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3, of the Constitution presents a federal question. Moreover, the meaning of a compact is a question on which this Court has the final say. . . ." *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 278 (1959). Once an interstate compact has been approved by Congress, ". . . no court may order relief inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1978). The court below has violated this prohibition by failing to apply the law of the applicable signatory and therefore review by this Court on this substantial federal question is warranted.

Under District of Columbia law, there is a four-part test which must be satisfied before a claimant may recover under the last clear chance doctrine. A claimant may only recover if it is proven:

> (1) that the plaintiff was in a position of danger caused by the negligence of both plaintiff and defendant; (2) that the plaintiff was oblivious to the danger, or unable to extricate herself from the position of danger; (3) that the defendant was aware, or by the exercise of reasonable care should have been aware, of the plaintiff's danger and of her oblivion to it or her inability to extricate herself from it; and (4) that the defendant, with means available to him, could have avoided injuring the plaintiff after becoming aware of the danger and the plaintiff's inability to extricate herself from it, but failed to do so. . . . The burden is on the plaintiff to present evidence on all four elements before a last clear chance instruction may be given. . . .

Felton v. Wagner, 512 A.2d 291, 296 (D.C. 1986).[2] This iteration of the law of last clear chance was adopted *verbatim* in *Queen v. WMATA*, 842 F.2d 476, 481 (D.C. Cir. 1988), a case which applied District of Columbia law. WMATA would be entitled to summary judgment, unless respondent is relieved from proving antecedent negligence on WMATA's part.

This Court has held that it will defer to the decisions of the District of Columbia Court of Appeals on matters of local law. *Purnell v. Southall Realty*, 416 U.S. 363, 368 (1974). The WMATA Compact requires the District of Columbia Circuit to follow the law as enunciated by the District of Columbia Court of Appeals on these matters.

The court below incorrectly held that, under District of Columbia law, "it is not necessary for the defendant to have been negligent before he discovered or should have discovered the dangerous position in which the plaintiff had negligently put himself." *See* p. 7a, *infra*. The court cited one District of Columbia Court of Appeals case and two District of Columbia Circuit cases for this proposition. The District of Columbia Court of Appeals decision, *Byrd v. Hawkins*, 404 A.2d 941 (D.C. 1979) (*per curiām*), enunciated the same four part test as *Felton*, including the re-

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[2] On appeal, the plaintiffs did not contest the District Court's reliance upon *Dean v. Century Motors*, 154 F.2d 201 (D.C. Cir. 1946), which holds that the doctrine presupposes a perilous situation created or existing through the negligence of both the plaintiff and the defendant. *See* p. 29a, *infra*. Plaintiffs quoted *Felton* in their reply brief. Reply Brief at 19. *Phillips v. D.C. Transit Corp.*, 198 A.2d 740, 742 (D.C. 1964), quoted in *Felton*, held that "the breach of a primary duty owed by defendant must be proved independently."

quirement of prior negligence. *Byrd*, 404 A.2d at 942. In *Felton*, 512 A.2d at 296, the District of Columbia Court of Appeals cited *Byrd* in support of the four part test.

Drapaniotis v. Franklin, 504 F.2d 236, 237 (D.C. Cir. 1974), the principal District of Columbia Circuit case cited by the court below, held that the plaintiff need not demonstrate that the defendant was negligent prior to the time at which he discovered or should have discovered the plaintiff's dangerous situation. Neither *Drapaniotis*, nor *Bowman v. Redding & Co.*, 449 F.2d 956 (D.C. Cir. 1971), also cited by the court below, have precedential value in determining District of Columbia law. Both were decided after February 1, 1971, the effective date of the court reorganization in the District of Columbia. Since then, the District of Columbia Court of Appeals has been the final arbiter of the District of Columbia's common law. *Holland v. Baltimore & O.R.R.*, 431 A.2d 597, 600 (D.C. 1981).

Consequently, this Court should grant certiorari to resolve the conflict between the decision below and the decisions of the District of Columbia Court of Appeals and to correct the failure of the District of Columbia Circuit to apply properly the governing provisions of the interstate compact.

II. THE WMATA COMPACT PRECLUDES JUDICIAL REVIEW, IN A COMMON LAW TORT ACTION, OF THE ADEQUACY OF WMATA'S DRUG TESTING.

A. INTRODUCTION.

The respondents have claimed that the operator was impaired and operated the train under the influence of cocaine. Urinalysis testing (the test performed here)

is not capable of determining whether a person is impaired or intoxicated by drugs. The tests reveal no information concerning the recency of drug use or the operator's impairment at the time of the accident. Courts focusing on the issue have agreed that urinalysis cannot show impairment.[3] Dr. Booker, respondents' only expert on the subject, conceded in his deposition that the results of the tests performed by WMATA gave no indication of impairment.

The District Court found that the test results were inadmissible because of the lack of expert testimony on the issue of impairment or because the evidence would not support a verdict on proximate cause. *See* pp. 25-26a, *infra*. The District of Columbia Circuit recognized that no tests showing impairment were performed. *See* p. 4a, *infra*. It directed that on remand, in assessing the admissibility of the test results, the district court must consider WMATA's failure to conduct "neurological testing" which the court below believed would have been probative of the employee's impairment at the time of the accident. *See* p. 9a, *infra*. This action subjects WMATA to unjustified liability for a suicide. Moreover, it pun-

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[3] *National Federation of Federal Employees v. Carlucci*, 680 F. Supp. 416, 428 at n.10 (D.D.C. 1988), *aff'd in part, rev'd in part*, 884 F.2d 603 (D.C. Cir. 1989). This is consistent with the view of Dr. Arthur McBay, the Chief Toxicologist in the Office of the Chief Medical Examiner of North Carolina, who states, "the concentrations of most drugs in urine, except for alcohol, cannot be correlated with blood concentrations or with impairment. The time that a drug was used cannot be established from urine concentrations. . . . The usual effects of most drugs persist for minutes to a few hours after use." McBay, *Efficient Drug Testing: Addressing the Basic Issues*, 11 NOVA L. Rev. 647, 649 (1987).

ishes WMATA for having adopted a voluntary program of urinalysis which is not probative of impairment. In light of the court's refusal to follow *Felton*, *supra*, WMATA will be subject to possible liability based upon a failure to conduct neurological testing which it had no duty to perform.

Respondents have the burden of proving that WMATA, through its train operator, acted with wanton negligence. This heightened standard of negligence applies because decedent was a trespasser on WMATA's tracks. The only evidence which respondents have identified as possibly probative of wanton negligence are the drug test results. If these test results are not admitted into evidence, there will be no basis for an inference of wanton negligence on WMATA's part.

B. A COURT MAY NOT HOLD WMATA LIABLE ON THE BASIS OF THE ELEMENTS OF ITS DRUG TESTING PROGRAM, A GOVERNMENTAL DECISION RESERVED TO IT UNDER THE COMPACT.

This case warrants Supreme Court review because it raises the question of judicial oversight of a function committed exclusively to WMATA's discretion. The decision below specifies additional requirements which WMATA should have used to ascertain whether its train operators were impaired. Under the Compact, WMATA's testing procedures are not subject to state statutory or decisional law. Moreover, WMATA has retained its sovereign immunity for governmental functions, and determination of the parameters of a drug test is a governmental function. § 80. Judicial second guessing of WMATA's policy choices in this area is foreclosed. *Skinner v. Railway Labor Executives' Association*, 489 U.S. ___, 109 S. Ct. 1402,

1419 n.9 (1989); *Sanders v. WMATA*, 819 F.2d 1151 (D.C. Cir. 1986).

There is no common law duty to conduct drug testing of employees. The drug testing program adopted by WMATA results in the immediate removal from service of any employee who tests positive on a post-accident test, without requiring a showing of impairment. This very same program was upheld as constitutional and as a reasonable safety measure in *Sanders*. The United States Department of Transportation has recently mandated a program of drug testing by private employers, which does not require neurological testing.[4] The court below should not have imposed additional obligations upon WMATA, since the Compact gives WMATA complete discretion over this subject.

WMATA retains its immunity for matters not expressly waived. *See Library of Congress v. Shaw*, 478 U.S. 310, 311 (1986). Section 80 of the Compact contains only a partial waiver of WMATA's sovereign immunity. WMATA has not waived its immunity for torts occurring in the performance of a governmental function. *Dant v. District of Columbia*, 829 F.2d 69

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[4] Under Department of Transportation regulations which affect an estimated 4 million employees in the transportation industries, an employee who tests positive on a urinalysis test, whether conducted on a random basis or following an accident, must be removed from a safety sensitive position. *See* 53 Fed. Reg. 47004 (1988). The Urban Mass Transportation Administration requires its grantees to conduct random testing. *See* 53 Fed. Reg. 47155 (Nov. 21, 1988), *final rule to be codified at* 49 CFR Part 653. The rule was challenged and upheld. *ATU v. Skinner*, No. 88-3642 (D.D.C. Sept. 22, 1989), *appeal pending*, No. 89-5380 (D.C. Cir.) (argued Dec. 14, 1989).

(D.C. Cir. 1987); *Sanders v. WMATA*, 819 F.2d 1151 (D.C. Cir. 1987); *Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986); *Martin v. WMATA*, 667 F.2d 435 (4th Cir. 1981). This immunity is a matter of federal law. *Morris*, 781 F.2d at 220. Since the implementation of a drug testing program and the design of specific components of the program are governmental functions, this is a matter for which WMATA has not waived its immunity.

As this is a governmental function, WMATA's exercise of its discretion is protected. In *Skinner*, this Court rejected claims that provisions for post-accident testing, comparable to those under which the WMATA operator was tested, were unreasonable because less drastic means were available to achieve the government's safety objectives. *Id.*, 109 S. Ct. at 1419. The Court held:

> the reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means. . . . [J]udges engaged in post hoc evaluations of government conduct can almost always imagine some alternative means by which the objectives of the [Government] might have been accomplished. . . . [R]espondents' insistence on less drastic alternatives would require us to second-guess the reasonable conclusions drawn by the FRA after years of investigation and study. (citations omitted).

Id. at n.9. In *Sanders*, the District of Columbia Circuit recognized that WMATA was immune from suit on constitutional and § 1983 challenges to WMATA's drug testing program, where the challenges attacked

the testing plan itself. 819 F.2d at 1156. The court held that the Compact barred "judicial 'second guessing' through a tort suit, of 'administrative [WMATA] decisions grounded in social, economic and political policy.' " *Id.* The remand to the district court violates these provisions of the Compact, because it requires evaluation of the reasonableness of the program adopted by WMATA and allows impermissible inferences to be drawn from the policy choice concerning testing made by WMATA, matters which under Section 80 are beyond the boundary of judicial scrutiny. Under the Compact, WMATA's failure to incorporate neurological testing as part of its post-accident testing program cannot be a basis for imposition of tort liability.

C. THE COMPACT'S LABOR RELATIONS ARTICLE PRE-EMPTS ANY FINDING OF NEGLIGENCE BASED ON THE FAILURE TO CONDUCT NEUROLOGICAL TESTING.

The Compact requires that the Authority engage in collective bargaining with represented employees concerning wages, salaries, hours, and working conditions, and requires that any labor dispute shall be submitted to arbitration. § 66(b). The term "labor dispute" is broadly construed and includes disputes concerning the making or maintaining of collective bargaining agreements, and the terms of such agreements. § 66(c). This provision is a federal labor statute. *See Office and Professional Employees International Union, Local 2 v. WMATA*, 724 F.2d 133, 137, 139 (D.C. Cir. 1983). As such, state tort causes of action are pre-empted where "courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the

States." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985).

The assessment required of the district court on remand is pre-empted as a matter of substantive federal labor law under *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1972). Section 12(g) of the Compact, which exempts WMATA from state regulations concerning the qualifications of employees, indicates that Congress intended to foreclose state law[5] as the source of minimum employment standards. Further, the Compact establishes WMATA's duty to bargain concerning conditions of employment, as broadly defined by the Compact. The operator was tested pursuant to a negotiated agreement, approved by WMATA's Board of Directors. *See* p. 45a, *infra*. In enacting the Compact, Congress intended that the signatories would not determine employment standards for WMATA employees and thus the subject of drug testing has been pre-empted. *See Golden State Transit Corp. v. City of Los Angeles*, ___ U.S. ___, 110 S. Ct. 444, 450 (1989).

In the case at bar, resolution of the state law claim cannot depend upon the scope of drug testing, because this would subrogate the exclusivity provisions of the Compact to state law. Under the Compact, WMATA and the unions are protected against interference by state government in regard to the establishment of employment standards, including the provisions of employee drug testing programs. The District of Columbia Circuit's attempt to dictate the

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[5] As defined by the Compact, "state" includes the District of Columbia. § 1(e).

provisions of WMATA's drug testing policy would authorize a cause of action in violation of the Compact. For this reason, this Court should review the case.

III. SUPREME COURT REVIEW IS REQUIRED BECAUSE THE DISTRICT OF COLUMBIA CIRCUIT FAILED TO FOLLOW THIS COURT'S HOLDINGS IN *ANDERSON* AND *MATSUSHITA*, WHICH REQUIRE REVIEW OF THE ENTIRE RECORD.

Under Fed. R. Civ. P. 56, a motion for summary judgment which is supported by sufficient evidence in the record must be granted, unless the party resisting summary judgment can establish that there is a material dispute of fact. The party resisting summary judgment must rely upon specific evidence in the record. Summary judgment is warranted if the court finds that a reasonable jury, applying the appropriate evidentiary standard, could only reach one conclusion. In reaching its decision, the court must review the entire record.

Here, the district court and the District of Columbia Circuit reached opposite conclusions regarding the sufficiency of the evidence. The District of Columbia Circuit found that there was a scintilla of evidence, which allegedly supported plaintiffs' claim, and there ended its inquiry. It gave no consideration to the extensive and irrefutable evidence to the contrary.

Under *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), a court is obligated to review the record as a whole, to determine whether under the applicable burden of proof, there is sufficient evidence upon which a jury could properly hold WMATA liable. Although courts should not remove from the triers of fact the task of weigh-

ing the evidence, on a motion for summary judgment the court must determine whether there is sufficient evidence to allow the case to go to the jury. In the case at bar, the court below simply established the existence of a scintilla of deposition testimony which allegedly supports the plaintiffs' claim, although it is inconsistent with other testimony by the same witnesses. The court erred. It was required to consider whether, given the entire record, a reasonable jury could hold WMATA liable under the preponderance of the evidence standard applicable to tort actions. *Anderson*, 477 U.S. at 252 (1986).

Plaintiffs' hope of reaching the jury relies on two thin threads: that they can establish first, by a preponderance of evidence, that the train could have stopped in time to avoid hitting decedent, and second, that but for the operator's alleged impairment, the train would have been stopped. The district court thoroughly canvassed the record and held that no reasonable jury, applying a preponderance of the evidence standard to all the evidence, could find that the train could have been stopped, because decedent jumped within 20 feet of the train. The District of Columbia Circuit did not consider the voluminous evidence in the record showing that the train could not have been stopped in time. The court below simply identified the testimony supporting plaintiffs' contention and held that this created a genuine issue for jury resolution. *See* p. 6a, *infra*. This violates *Matsushita*, which held that "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " 475 U.S. at 587.

It is undisputed that the decedent intended to take her own life by jumping in front of a subway train. She timed her jump so as to insure her demise, by waiting until the last possible moment. Five eyewitnesses testified that the train could not have been stopped in time. Six eyewitnesses said that the train was already in the station, some stating that three cars were already in the station when the decedent jumped. All of the eyewitnesses observed that the decedent was no more than 20 feet from the train when she jumped. One witness testified that he observed the decedent as her body left the platform and observed the operator instantly hit the stop button. At the time of impact, the train was traveling between 23 and 42 feet per second. There is no dispute that, if the decedent jumped when the train was 20 feet from her, the train could not have stopped in time to avoid the tragedy.

The court below relied upon the testimony of two witnesses, Messrs. Thompson and Moore, to find that there was a material dispute of fact. The depositions of these two men were internally inconsistent between their observations of distance and estimates of elapsed time. Each stated that the decedent jumped within 20 feet of the train, and that between 5 and 15 seconds elapsed before the decedent was struck by the train. This testimony is physically impossible, as the train would have traveled 20 feet in approximately 1 second, assuming a speed of 23 feet per second. The time estimates of Messrs. Moore and Thompson would put the train far back in the tunnel (100-300 feet from the decedent) at the time decedent jumped, where no one places it. The time estimates of Moore and Thompson contradict their own testi-

mony that decedent was 20 feet from the train when she leaped. The nine other eyewitnesses all testified that decedent jumped within 20 feet of the train, after it was in the station, without giving contradictory estimates of the elapsed time.

Moreover, Mr. Thompson also testified that in the same instant he saw decedent leap, he saw the train operator hit the emergency brake. Thompson's estimate of the time was quite hazy, as he testified that "time seemed to slow down," and he gave divergent estimates of the amount of time which elapsed, testifying that it was either 5, 10 or 15 seconds. A 10 second discrepancy equates to a difference of more than 200 feet. Mr. Moore testified that in his opinion the train could not have stopped in time to avoid hitting decedent.

In analyzing whether there was a genuine issue of fact, the court below gave no consideration to any part of the record, other than the isolated snippets of testimony that between 5 and 15 seconds elapsed before decedent was struck and it ignored the countervailing testimony presented by the very same witnesses who offered these elapsed time estimates. Estimates of time are notoriously unreliable.[6] This Court has held that "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict,

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[6] "If much happens in a short time, we overestimate the time-interval." "Estimates of a given ten second interval varied from 1/2 to 60 seconds; [estimates] of a three second interval varied from 1/2 to 15 seconds." Gardner, *The Perception and Memory of Witnesses*, 18 Cornell L.Q. 391, 399 (1933). Estimates can be wrong by as much as a factor of 20.

the court should determine the proceeding. . . ." *Brady v. Southern Ry.*, 320 U.S. 476, 479-480 (1943).

The decision below invites a jury to engage in sheer speculation concerning the interpretation of testimony by Messrs. Moore and Thompson. The Fourth Circuit has warned:

> This emphasis, where causation is dispositive, upon "probability," "reasonable probability," "substantial probability" rather than mere "possibility" as the proper test simply bespeaks the special danger that in a matter so generally incapable of certain proof jury decision will be on the basis of sheer speculation, ultimately tipped, in view of the impossibility of choosing rationally between mere "possibilities," by impermissible but understandable resort to such factors as sympathy and the like.

Lovelace v. Sherwin Williams Co., 681 F.2d 230, 242 (4th Cir. 1982), quoting *Brady v. Southern Railway Co.*, 320 U.S. 476, 480 (1943) and *Galloway v. United States*, 319 U.S. 372, 395 (1943). Scientific causation may be removed from the jury if the evidence only provides a mere possibility, not a probability of proof. *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 829 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 218 (1989).

On summary judgment, Fed. R. Civ. P. 56 requires a court to review all the evidence in the record, both that which supports and that which undermines plaintiffs' theory of the case. Here, the court below ended its inquiry once it concluded that there was a scintilla of evidence supporting plaintiffs' claim. Rule 56, as well as this Court's decisions in *Anderson* and

Matsushita Electric, require a more exhaustive approach before a properly supported motion for summary judgment may be denied. Granting certiorari on this important principle will provide important guidance to the lower courts applicable to a broad spectrum of cases.

CONCLUSION

The court below violated the Compact in several ways. First, by refusing to follow *Felton v. Wagner*, 512 A.2d 291 (D.C. 1986), it violated Section 80 of the Compact by subjecting the Authority to tort liability on a common law theory not recognized by the District of Columbia, the applicable signatory. Second, it further abrogated WMATA's sovereign immunity by inviting the district court to evaluate the propriety of WMATA's drug testing policy, which is a governmental decision reserved to WMATA's discretion by Section 80. Third, the standards for employee drug testing are pre-empted by the labor relations article of the Compact.

The decision below should also be reversed because WMATA is entitled to summary judgment under *Anderson* and *Matsushita*. There are insufficient facts in the record to allow a reasonable jury to conclude by a preponderance of the evidence that the train could have been stopped in time to avoid hitting the decedent.

For the foregoing reasons, we urge the Court to grant the petition and reverse the judgment below.

Respectfully submitted,

GERARD J. STIEF
Associate General Counsel
Counsel of Record

BRUCE P. HEPPEN
Assistant General Counsel

FREDRIC SCHUSTER
Assistant General Counsel

ROBERT J. KNIAZ
Acting Deputy General Counsel

ROBERT L. POLK
General Counsel

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY
600 Fifth Street, N.W.
Washington, D.C. 20001
(202) 962-2569

Counsel for Petitioner

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 13, 1989 Decided August 22, 1989

No. 88-7073

ELEANOR T. JOHNSON, *et al.*, APPELLANTS

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Appeal from the United States District Court
for the District of Columbia
(C.A. No. 86-3110)

David T. Smorodin, with whom *W. David Allen* was on the brief, for appellants.

Bruce P. Heppen, with whom *Fredric H. Schuster*, *Gerard J. Stief*, *Robert J. Kniaz* and *Robert L. Polk* were on the brief, for appellee.

Sara E. Lister also entered an appearance for appellee.

Before: MIKVA and RUTH B. GINSBURG, *Circuit Judges*, and HOGAN,* *District Judge*.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: Eleanor and Franklin Johnson's daughter was struck and killed by a Washington Metropolitan Area Transit Authority ("WMATA") subway car. The district court dismissed their suit against WMATA on summary judgment. We conclude that the district court erred in finding that certain internal inconsistencies in the testimony of two witnesses rendered that testimony inherently incredible. Because the district court disregarded aspects of that testimony which were favorable to appellants in evaluating whether there were genuine issues of material fact, we reverse and remand this case to the district court for further proceedings.

I. BACKGROUND

On March 20, 1986, Devora Johnson, a 29-year-old medical claims examiner and mother of a three-year-old, left work in Rockville, Maryland, rode the subway partway home, and ostensibly waited to change trains at the Metro Center station. What happened next is the subject of this suit. All the witnesses say that she leapt, purposefully, onto the subway tracks as the train was approaching. Even appellants conceded at oral argument that all the evidence supported the conclusion that Devora had jumped, and that no evidence suggested she fell or was pushed. Devora had a history of mental illness. She was hospitalized seven times with diagnoses such as schizophrenia, paranoia and manic depressive syndrome, and twice as having "suicidal ideations."

It is disputed, however, whether the train was far enough away from Devora when she jumped to have been able to stop before hitting her. The subway train was operating automatically when it entered the station, programmed by computer. At some point, the train operator saw Devora on the tracks and pushed the emergency stop button and the brakes engaged. The braking stopped the train short of its usual stopping point, but not

enough to avoid the accident. The police questioned more than a dozen witnesses, whose versions of the event are not wholly reconcilable. Some said that the train was so close when Devora jumped that she was hit in mid-air. Others said that she jumped onto the tracks, then laid down on them and waited until the train struck her. The medical examiner's testimony—that the victim's injuries were consistent with being run over but not with being hit in mid-air—supports the version that she was lying down when hit. This version is also supported by testimony from a WMATA maintenance employee that he found a coil under the front of the subway car broken after the accident, but there were no marks or indications of collision on the front of the car.

The witnesses were asked to estimate the distance between Devora and the train at the time she jumped. Their estimates vary from 4 to 45 feet. It is undisputed that if anything within this range is correct, the train could not have stopped in time under any circumstances. When the train entered the station, it was travelling 28.66 miles per hour, or 41.95 feet per second. When the operator pushed the emergency button it was travelling 15.65 miles per hour, or 22.96 feet per second. Even at the slower speed, the train would have required 157 feet to stop.

However, two witnesses also testified as to how much time elapsed between the jump and the collision. Ronald Thompson, a WMATA employee at the time of the accident, estimated that 5 to 15 seconds elapsed. He also quoted Joanne Funderburk, a current WMATA employee, as having said at the time that she thought it was 20 to 30 seconds. A second witness, Ricardo Louis Moore, estimated the interval at 10 seconds. Appellants presented expert testimony that in 10 seconds an attentive train operator could have seen the victim jump, pushed the brake button and stopped the train before it hit her. Thompson and Moore also estimated that the distance be-

tween Devora and the train was 10 to 20 feet, at the time she jumped.

After the accident, following standard WMATA procedure, the train operator was tested for the presence of alcohol or drugs. He tested positive for marijuana and cocaine. A validating test, using thin layer chromatography, was performed. No tests showing the quantity of drugs taken or the current level of impairment, if any, were performed. The operator claimed, in his deposition, that he had not used marijuana or cocaine in the previous three months.

II. Discussion

At the core of the district court's grant of summary judgment to WMATA is its discrediting of Thompson's and Moore's testimony. The court found, and we do not disturb its findings, that WMATA was not negligent in failing to prevent Devora from jumping and, in any case, any negligence claim was barred by Devora's assumption of the risk or at least contributory negligence. This left the question of whether the train operator had the last clear chance to prevent Devora's death. Having put aside the testimony that the train operator had some 10 seconds or so to respond after Devora jumped, the court concluded from the remaining evidence that not even the most diligent operator could have stopped the train in time and therefore the last clear chance doctrine was inapplicable.

The district court's grant of summary judgment can be upheld only if, viewing the evidence in the light most favorable to the Johnsons, there is no genuine issue of material fact. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); Fed. R. Civ. P. 56(c); *cf. Capital Transit Co. v. Gamble*, 160 F.2d 283 (D.C. Cir. 1947) (reversing denial of judgment NOV where the only evidence introduced to support plaintiff's negligence claim was equally consistent with a find-

ing of no negligence and therefore was insufficient to establish either). If reasonable minds could differ as to the import of the evidence, summary judgment cannot be sustained. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

The district court explained that it disregarded Thompson's and Moore's estimate of the number of seconds that elapsed as inherently incredible because it was contradicted by a number of other witnesses and because it was inconsistent with the same witnesses' estimations of distance. We conclude that neither circumstance supports the court's excluding this testimony from its summary judgment determination.

The fact that there were witnesses whose testimony, that the train was in the station and only a few feet from Devora when she jumped, contradicted that of Thompson and Moore plainly does not render Thompson's and Moore's testimony incredible. It merely demonstrates that the issue is disputed. The judge's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but only to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249.

Judges may, under certain circumstances, lawfully put aside testimony that is so undermined as to be incredible. The removal of a factual question from the jury is most likely when a plaintiff's claim is supported solely by the plaintiff's own self-serving testimony, unsupported by corroborating evidence, and undermined either by other credible evidence, physical impossibility or other persuasive evidence that the plaintiff has deliberately committed perjury. *See Ralston Purina Co. v. Hobson*, 554 F.2d 725 (5th Cir. 1977) (upholding judgment NOV because claimant's testimony as to how and why chickens were supposed to have died and was unsupported by other evidence and inconsistent with the known physical facts and considerable expert testimony on chicken be-

havior); *Law v. Virginia State Lines*, 444 F.2d 990 (D.C. Cir. 1971) (upholding judgment NOV despite plaintiff's self-serving testimony because it was unsupported by other evidence and contradicted by disinterested as well as interested witness); *Southern Pacific Co. v. Matthews*, 335 F.2d 924 (5th Cir. 1964) (reversing judgment for plaintiff because it was supported only by his self-serving testimony which was contradicted by disinterested witness testimony and undisputed proof as to the physical layout of the railroad right of way), *cert. denied*, 379 U.S. 970 (1965); *Washington, Marlboro & Annapolis Motor Lines v. Maske*, 190 F.2d 621 (D.C. Cir. 1951) (reversing judgment for plaintiff because it was supported only by her self-serving testimony which was not only contradicted by numerous disinterested witnesses but also undermined by proof of her earlier statement that the opposite was true), *cert. denied*, 342 U.S. 834 (1952).

In contrast, both Moore and Thompson are disinterested witnesses. Their testimony that some 10 seconds or so elapsed after the victim jumped and before she was hit is not, in itself, inherently implausible or contradicted by undisputed physical evidence. There is no evidence suggesting that either has perjured himself.

The difficulty that the testimony presents is that neither Thompson nor Moore can be correct about both how much time elapsed *and* how far the train was from Devora when she jumped. But that the time and distance estimates are incompatible with each other does not resolve which is correct. Nor does this kind of inconsistency, between quantitative estimates of a momentary event, render the entire testimony untrustworthy. Viewing Thompson's and Moore's testimony from the point of view most favorable to the Johnsons, it supports the conclusion that the train operator had enough time to stop the train without harming their daughter. We find, therefore, that there is a genuine issue as to whether the collision could

have been avoided, an issue appropriately resolved by a jury. *See Tyler v. Starke*, 128 F.2d 611 (D.C. Cir. 1942) (testimony as to distance and speed of driver when he saw pedestrian sufficient to send question of whether he could have avoided accident to the jury); *Heurich Brewing Co. v. McGavin*, 16 F.2d 334, 336 (D.C. Cir. 1926) (last clear chance must be submitted to jury unless facts are undisputable, established by evidence that is free from conflict, and inference from the facts is so certain that all reasonable people must agree); *see also Newman v. Eisenberg*, 213 A.2d 584, 585-86 (D.C. 1965) (affirming fact-finding that at least a few seconds existed in which accident could have been avoided despite contrary evidence in record).

This is not, however, the end of the matter, as WMATA argues that the grant of summary judgment can be affirmed on other grounds. First, WMATA argues that one of the essential elements of the last clear chance doctrine is that both plaintiff's and defendant's negligence must have placed the decedent in a position of peril and that the record contains no evidence tending to show such antecedent negligence by WMATA. This characterization of the last clear chance doctrine is erroneous. Under District of Columbia law, it is not necessary for the defendant to have been negligent before he discovered or should have discovered the dangerous position in which the plaintiff had negligently put himself. The defendant runs afoul of the last clear chance doctrine when he fails to use, with the appropriate standard of care, the ability which he then has to prevent injury to the plaintiff. *See Byrd v. Hawkins*, 404 A.2d 941 (D.C. 1979); *see also Drapaniotis v. Franklin*, 504 F.2d 236, 237-38 (D.C. Cir. 1974); *Bowman v. Redding & Co.*, 449 F.2d 956, 970 (D.C. Cir. 1971) (supplemental opinion). Thus, it is unnecessary to consider whether WMATA is correct that no evidence supports prior negligence on its part, as such evidence is not required to withstand summary judgment.

Next, WMATA argues that the record contains no evidence to support the claim that, in failing to avoid the accident, it breached the applicable standard of care. The district court found, and we agree, that under District of Columbia law, Devora Johnson became a trespasser when she jumped onto the tracks. Trespassers may only recover for "intentional, wanton or willful injury or maintenance of a hidden engine of destruction." *Holland v. Baltimore & O.R. Co.*, 431 A.2d 597, 599 (D.C. 1981) (en banc). Appellants claim that the train operator wantonly injured their daughter because he was operating the train under the influence of narcotic drugs, with reckless disregard for human life. Under the doctrine of respondeat superior, WMATA would be liable if its operator wantonly injured the decedent. *See Weinberg v. Johnson*, 518 A.2d 985, 988 (D.C. 1986). WMATA argues that the drug tests performed did not test whether the train operator was under the influence of the drugs at the time of the accident, that there was no expert testimony establishing any link between the test results and impairment, and that no other evidence that the driver was under the influence of the drugs and impaired at the time of the accident was submitted.

The results of the drug tests would not be admissible if they were found to be either irrelevant or if their relevance was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See* Fed. R. Evid. 401-403. The district court analyzed briefly whether the lack of expert evidence rendered the test results inadmissible but left ambigous whether it based summary judgment on a finding that the tests were inadmissible or primarily on its conclusion that even a sober operator would have been unable to stop the train in time. The court also did not consider, in analyzing admissibility, the possible relevance of two other pieces of evidence: (1) the train operator's presumably false testimony that he had not taken any drugs in the past three months, and (2) WMATA's failure to

have more thorough tests performed which would have indicated more about when the operator took the drugs, and whether he was impaired at the time of the accident. The district court did not consider the possible relevance of these pieces of evidence, although there was expert testimony on the record that a neurological test would have shown whether and to what extent the operator was impaired, and did not unambiguously reach the question of admissibility. Because questions of admissibility are largely committed to the discretion of the trial court, we remand. *See Lewis v. District of Columbia*, 793 F.2d 361, 363 (D.C. Cir. 1986). The question to be decided on remand is whether—if the district court assumes, as it must in addressing this issue, that there was sufficient time to stop the train—the results of the drug tests are probative on the issue of whether the train operator behaved wantonly or merely negligently, and if so, whether that relevance is not substantially outweighed by the danger of unfair prejudice. Probativeness must be considered in light of the evidence of the operator's false testimony and WMATA's failure to conduct further tests. If the trial judge concludes that the drug test results are not admissible, then summary judgment for WMATA would be appropriate due to the lack of evidence that WMATA breached the applicable standard of care.

Finally, we have no cause to hold the last clear chance doctrine inapplicable in a suicide case. To begin with, it is to be remembered that we are a federal court sitting in diversity. Our task is merely to divine and apply District of Columbia law. *See Hall v. C. & P. Telephone Co.*, 793 F.2d 1354, 1356-57 (D.C. Cir. 1986). While we find that the District has long recognized the doctrine of last clear chance, *see, e.g., Terminal Taxicab Co. v. Blum*, 298 F. 679 (D.C. Cir. 1924), our review uncovers no D.C. case in which a suicide exception to that doctrine was found.

Nor have the D.C. courts given any indication that such an exception would be found if a case properly pre-

sented the issue. In *Toy v. District of Columbia*, 549 A.2d 1 (D.C. 1988), plaintiffs sued on behalf of a decedent who hung himself while in jail awaiting a hearing on the charge of drunken driving. Plaintiffs claimed, *inter alia*, that the District had the last clear chance to save the decedent but had failed to have certain equipment on hand and to administer cardiopulmonary resuscitation properly. That the decedent had attempted suicide was undisputed. The trial court permitted the question to go to the jury on the last clear chance claim as well as primary negligence claims, and then, after the jury returned a verdict for plaintiffs, granted judgment notwithstanding the verdict for defendants on the grounds that there was insufficient evidence showing that defendants had had a last clear chance to save the decedent's life or had failed to respond properly. The appeals court affirmed on the ground that there was no showing that defendants' actions violated an appropriate standard of care. Neither court dismissed the last clear chance claim because the decedent deliberately put himself in peril nor did either assume without deciding that the doctrine applied even to a suicide attempt. Both courts simply treated the case as any other involving the last clear chance doctrine.

Moreover, we have not found a single jurisdiction that has recognized a suicide exception. Admittedly, this is a rare issue and there is little evidence in either direction, but what scant evidence there is tends to support the viability of the last clear chance doctrine even when the decedent places himself in peril by attempting suicide. In *Rinaldo v. New York City Transit Authority*, 39 N.Y.2d 285, 383 N.Y.S.2d 571, 347 N.E.2d 897 (N.Y. 1976), plaintiff, who survived being hit by a subway car, claimed to have been pushed onto the tracks; the defendant submitted evidence supporting its claim that plaintiff had tried to kill himself. Following a verdict and judgment for defendant, plaintiff appealed on two grounds, one of which was that the last clear chance instruction did not permit the jury to apply the doctrine

if it found that plaintiff had tried to commit suicide but that the train could have stopped in time to avoid hitting him. The court upheld the judgment on the ground that the instruction did allow the jury to apply the doctrine under those circumstances. *Rinaldo*, 347 N.E.2d at 898. The highest courts of both Missouri and Kentucky have not ruled on last clear chance in a suicide case, but have held the doctrine applicable even for reckless plaintiffs. *See Wyckoff v. Davis*, 297 S.W.2d 490 (Mo. 1957); *Brooks v. New Albany & L. Electric R. Corp.*, 280 Ky. 157, 132 S.W.2d 777 (1939). Both courts reasoned that the last clear chance test is not affected by how a plaintiff came to be, or remain, in peril. *Wyckoff*, 297 S.W.2d at 494; *Brooks*, 132 S.W.2d at 780. Missouri's highest court has also speculated on whether the recklessness rule would also stretch to suicide and concluded that no precedent prevented such a result. *State v. Bland*, 354 Mo. 868, 191 S.W.2d 660 (1945).

In the absence of local or widespread national precedent, we are unprepared to assume that the District of Columbia Court of Appeals would carve out a suicide exception from its long-established last clear chance doctrine. Essentially, this is a question of policy, a decision as to when the value of human life places a heavy responsibility on all comers. Without any indication from the District's courts that attempted suicide is an act unlike any other that obviates this obligation to preserve life, we cannot take it upon ourselves to reorder the local government's priorities. Indeed, the District of Columbia's court's recent acquiescence in the applicability of the doctrine in *Toy* suggests that such intereference would be most unwelcome and altogether inappropriate.

The District of Columbia does recognize a rule that suicide is a deliberate, intentional, and intervening act which precludes recovery in most cases for negligent acts alleged to have caused the decedent to take his own life. *District of Columbia v. Peters*, 527 A.2d 1269, 1275

(D.C. 1987) (decedent committed suicide after being paralyzed from the chest down from a wound inflicted during his arrest by the arresting officer). Thus, under D.C. law, a suicide attempt is deemed to have broken the causal chain between any negligent act committed earlier and the suicide victim's injury. Such a rule, however, sheds no light on the case at bar. There are no remaining allegations that WMATA failed to prevent Devora Johnson from attempting suicide or that WMATA's negligence drove her to it. The allegedly negligent act of which plaintiffs complain—failure to stop the train—was committed after Devora jumped onto the tracks. The *Peters* rule limits the duty to prevent suicide; it does not modify the duty to prevent injury to others when their fate has fallen into one's hands.

III. Conclusion

In view of the foregoing, we conclude that summary judgment for WMATA in the Johnsons' negligence suit was premature. There is a genuine issue of material fact as to whether the train operator could have seen Devora Johnson earlier and responded more quickly, thereby stopping the train before it killed her. If the trier finds that the accident could have been avoided, there are genuine issues to be resolved as to several other elements of the last clear chance. There is also the knotty question of whether the drug test results are admissible, and if so, in what manner. Given our holding as to the significance of the conflict in witness testimony between time and distance estimates, the trial court might want to reconsider its decision not to compel the production of the statements made by non-employee witnesses to WMATA investigators at the scene. Only defendants and the police, not plaintiffs, had representatives at the scene of the accident. Moreover, while plaintiffs had legal access to the names of witnesses questioned by police, not all the witnesses questioned by WMATA were questioned by the police and WMATA refused to turn

over even its witness list to plaintiffs until ordered to by the court one and one-half years later. These statements may contain additional information on the time and distance question, or others in the case such as the demeanor of the train operator. Such contemporaneous statements cannot be replicated by subsequent discovery. Because we find that summary judgment is not appropriate as the case stands, we reverse the judgment of the district court and remand for further proceedings consistent with this decision.

It is so ordered.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-3110-LFO

ELEANOR T. JOHNSON, *et al.*,

Plaintiffs,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant.

FILED

FEB 5 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM

An Order filed on January 27, 1988 granted summary judgment for defendant for reasons to be elaborated in a memorandum to be filed. This is that memorandum.

On March 20, 1986, Devora H. Johnson leaped from the passenger platform into the path of an oncoming train on the lower level tracks at the Metro Center subway station. The train struck and fatally injured her. Decedent's next of kin brought suit against the Washington Area Metropolitan Transit Authority (WMATA), alleging that her death was proximately caused by the negligence of defendant. They allege, *inter alia*, that defendant and its employees were negligent in permitting the decedent to stand too close to the edge of the platform and in failing

to take precautions to prevent her from jumping on to the tracks in the path of an oncoming train. They also allege that the operator of the train that struck decedent, Keister N. Dixon, was negligent in not stopping the train before it struck and killed her. Plaintiffs seek two million dollars in compensatory damages and four million dollars in punitive damages.

Defendant moved for summary judgment contending that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. In considering this motion, the facts and the "inferences to be drawn" from them "must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). *See also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

I

In brief, the following undisputed material facts are taken from the statements of material facts filed by the parties and are based on affidavits, depositions, and documents. On March 20, 1986, decedent Devora H. Johnson was 29 years old, unmarried, and employed as a medical claims examiner at the Claims Administration Corporation in Rockville, Maryland. Defendant's Statement of Material Facts to Which There is No Genuine Dispute ("D") ¶ 1; Plaintiffs' Statement of Material Facts to Which There is a Genuine Dispute ("P") ¶ 1. Prior to March 20, 1986, decedent had been hospitalized seven times on an in-patient basis and treated three times on an out-patient basis at Providence Hospital and the Psychiatric Center in Washington, D.C. for paranoia, manic depression, and schizophrenia. D ¶ 4. She was diagnosed as having "suicidal ideations" during at least two of her psychiatric hospitalizations. Defendant WMATA's Response to Plaintiffs' Statement of Material Facts to Which There is a Genuine Dispute ("D2") ¶ 9.

On March 20, 1986, decedent received a telephone call at work which upset her. D ¶ 5. She cried; she also threw water in the face of a co-worker. D ¶ 5. Because decedent appeared upset, her immediate superviser Carolyn Rose Jackson and Ms. Jackson's fiance drove decedent to the Rockville Metro station after work. D ¶ 7. Decedent rode a Red Line train from the Rockville Metro station to Mazza Gallery at Friendship Heights, where she shopped and purchased some new clothing at Woodward and Lothrop. P ¶ 10; D ¶ 8. At Friendship Heights decedent discovered that she was short of money and could not pay the metro fare. She was befriended by Karen S. Drew, who gave her money for the fare. D ¶ 8. Decedent and Ms. Drew rode the Red Line train together from Friendship Heights to the upper level of Metro Center and then separated. D ¶ 9. During the ride, decedent spoke to Ms. Drew about music videos and about where she was going. She also mentioned that her mother was probably worried because she had not called to let her know that she had been shopping and would be late getting home. P ¶ 11; D2 ¶ 11.

At Metro Center, decedent exited her Red Line train and proceeded to Metro Center's lower level to take an Orange Line train in the direction of New Carrollton. P ¶ 12; D ¶ 9. Decedent waited for a train on the New Carrollton/Addison Road side of the passenger platform in the general vicinity of the Silver Spring escalator. P ¶ 13; D ¶ 10. While she waited for her Orange Line train from, at the latest, 8:44 p.m. to 8:50 p.m., decedent asked WMATA employee, Jo Ann Funderburk, several times when the next train was due. P ¶¶ 14, 16; D ¶ 11; D2 ¶ 14; Funderburk Affidavit ¶ 2. During the time decedent waited for her Orange Line train to New Carrollton, at least one other train entered and exited the lower level of Metro Center without incident. P ¶ 15. Decedent did not tell anyone that she intended to commit suicide or intended to leap in front of a train. D ¶ 11.

At approximately 8:50 p.m., the lights on the platform began flashing indicating that a train bound for New Carrollton/Addison Road was approaching the station. P ¶ 18; D ¶ 12; D2 ¶ 18. As the warning lights blinked, an unidentified woman told Devora Johnson "to move back from the track." P ¶ 21; D2 ¶ 21. There is conflicting testimony about decedent's precise proximity to the edge of the passenger platform as the train entered the station. *See* P ¶ 19. Some testimony places her with one foot on the orange tiles and one foot on the white strip by the lights. Deposition of Ronald Thompson at 42. In any event, however, there is no evidence proffered that decedent was poised to leap onto the tracks or was leaning over the edge of the platform projected into the path of the train as it entered the station.

As the train entered the station, it was operating on an automatic speed programmed by computer. It was operating in the Automatic Train Operation (ATO), mode 1. D ¶ 21. This is the normal programmed mode of operation for WMATA trains whereby their speed and braking is automatically regulated. The operator, Keister Dixon, was not driving or operating the train; it was being operated automatically. D ¶ 21. As it entered the tunnel at Metro Center station, the train was traveling at an average velocity of 28.6 miles per hour or 41.95 feet per second. D ¶ 23.

When the train was 4 to 20 feet away from decedent, she jumped or leaped from the passenger platform into the path of the oncoming train. D ¶¶ 13-14. As she jumped into the train's path, the operator, Keister Dixon, "instantly" depressed the emergency "mushroom" stop button, which applied the emergency brakes. D ¶¶ 17, 18; Deposition of Keister Dixon at 41-42, 44-46; Deposition of Vincent Wayne Jordan at 9-10, 11, 13-14, 22-23, and 31; Thompson Deposition at 13-15; Funderburk Affidavit ¶ 3. Compare P ¶¶ 33-34. The operator fractured his hand as a result of the force used in depressing the mushroom

button. D ¶ 20. In an emergency situation where a person jumps in front of a subway train or is on the tracks, the quickest way to bring the train to a stop is to depress the emergency mushroom button. D ¶ 26.

While some witnesses testify that decedent was struck in mid-air and some testify that she lay on the track before she was struck, *all* eye witnesses agree that decedent was from 4 to 20 feet away from the front of the train when she jumped. D ¶¶ 14-16; P ¶¶ 35-45; D2 ¶¶ 35-45. At the time that the emergency mushroom button was depressed, the train was travelling at 15.65 miles per hour or 22.96 feet per second. D ¶ 23. At that speed, the train would require 157 feet to stop under emergency conditions. D ¶ 23. When the train came to a stop, the front of the train was 188 feet and 3 inches from the end of the platform, which was 113 feet short of its normal stopping point. D ¶ 23. After the train came to a stop the emergency mushroom button was found in the depressed position and the air was vented from the brakes indicating that the button had been pressed and the brakes applied. D ¶ 19.

After the accident, the train operator underwent a mandatory post-incident medical examination. P ¶ 67; D2 ¶ 67. He tested positive for cocaine and marijuana metabolites. P ¶¶ 68, 69; D2 ¶¶ 59, 68, 69. Defendant suspended him. P ¶ 75; D2 ¶ 75.

WMATA's rules and regulations forbid train operators from using marijuana or cocaine. P ¶ 62; D2 ¶ 62. Individuals who test positive on post-accident medical examinations are precluded from operating a train until their drug problem is eradicated. P ¶ 60; D2 ¶ 60. Employees who have ingested cocaine and marijuana will have a reduced efficiency. P ¶ 61; D2 ¶ 61. Roger Wood, WMATA's Manager of Safety and Fire Protection, admitted that use of illicit drugs by an employee in a safety-sensitive position, such as a train operator, poses potential safety risks. P ¶¶ 57-58; D2 ¶¶ 57-58. The operator had attended a

party on March 15, 1986, five days before the accident, at which other people at the party, including other WMATA employees, were using cocaine and marijuana. He stated that he drank a lot of beers at the party, but could not recall the next morning everything he had done at the party. P ¶¶ 63-65; D2 ¶¶ 63-65.

Plaintiffs offered an expert witness on the question of whether the decedent's death was proximately caused by drug-related impairment of the train operator. The expert, Dr. Walter Monroe Booker, is the 79-year old president of a consulting firm. Booker Deposition at 1-2. He has lectured on drug abuse and related subjects and has testified many times in criminal cases and in some civil cases. *Id.* at 4, 7, 10-12. He has never personally participated at the laboratory level in primary research projects or made any scholarly presentation involving the use and effects of marijuana and cocaine. *Id.* at 27-31. He has participated on boards and committees considering the awarding of grants and contracts in the field of pharmacology.

Dr. Booker had been asked by plaintiffs to give an opinion regarding "the matter of [the train operator's] drug involvement and extent to which the drug involvement may not have had influence on the behavior and on the type of control the engineer had." *Id.* at 38. Dr. Booker never met the operator and did not recall reading his deposition. *Id.* at 42. Nor had he read any police reports. *Id.* at 43. He was never provided information as to how decedent came into contact with the train. *Id.* at 45-46.

The test results relied upon by Dr. Brooker did not indicate the quantity of drugs or drug metabolites present in the operator's bodily fluids. *Id.* at 57. The test relied upon was "the screening type" which is "not concerned with the amount but rather the presence, which would indicate that the controlled drug or mother substance . . . must have at some time been taken." *Id.* at 59. Dr. Booker could not address the question of impairment because he

did not see any evidence that a neurological examination was actually given. *Id.* at 59-60. Dr. Booker stated that he did not "really know the extent to which [the operator] was impaired except to say that he had had the whole substance or the mother substance of marijuana and cocaine introduced into his body." *Id.* at 60.

According to his Rule 26(b)(4) statement, Dr. Booker was expected to testify that it was his opinion to a reasonable degree of medical certainty that the operator's drug use "impaired his ability to operate and brake the train in a safe manner at the time of the accident and made it more likely than not that the accident that occurred in the instant case would occur." *See* Plaintiffs' Second Supplement to Rule 26(b)(4) Statement ¶ 4. At his deposition, however, Dr. Booker was not prepared to state to a reasonable degree of medical certainty that the operator's drug use made it more likely than not that the accident that occurred would occur. Booker Deposition at 75, 71-72. Moreover, none of the other witnesses who observed the operator during or after the incident detected any sign that the operator was under the influence of drugs or alcohol or was otherwise impaired. *See* Jordan Deposition at 12; Deposition of Forest E. Hamlin at 45-46; Deposition of Richard T. Brunina at 39.

WMATA expects its employees to be vigilant in the pursuit of safety, and to try to prevent injury, either accidental or self-induced, if possible. P ¶¶ 49-50; D2 ¶¶ 49-50. WMATA teaches its train operators that the potential exists for a WMATA patron to end up on the tracks. P ¶¶ 53-54; D2 ¶¶ 53-54. Approximately 20 people have been killed by being struck by WMATA trains. P ¶ 51; D2 ¶ 51. Detective Brunina testified that he had investigated personally five or six cases where WMATA trains had struck people on the tracks. P ¶ 52; D2 ¶ 52. The WMATA Training Manual states that "[w]hen a Train Operator observes an unprotected person on the track ahead of a train he must make every effort to avoid hitting the person," and

this teaching is formally incorporated into WMATA's "Standard Operating Procedure # 26." P ¶¶ 54-55; D2 ¶¶ 54-55. Train operators are to be vigilant at all times during operations keeping a watch for such an incident. P ¶ 56; D2 ¶ 56.

II

A. The Trespasser Doctrine

Defendant contends that the trespasser doctrine as applicable in the District of Columbia bars any recovery by plaintiffs in this matter. *See* Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment ("Defendant's Mem.") at 7-17. Trespassers may only recover from landowners for injuries that were "wilfully or wantonly inflicted, or caused by a hidden engine of destruction." *Washington Metropolitan Area Transit Authority v. Ward*, 433 A.2d 1072, 1074 (D.C. App. 1981). *See also Whitaker v. WMATA*, No. 82-2771 (D.D.C. May 4, 1984), *aff'd mem.*, 804 F.2d 153 (D.C. Cir. 1986). In *Whitaker*, the court granted defendant's motion for summary judgment where the plaintiff, a trespasser on metro tracks, was severely injured when struck by a train.

Defendant in this case argues that decedent, in attempting to commit suicide on the subway tracks, was clearly a trespasser there, and that the operator did not operate the train in a willful, wanton, or reckless manner. Rather, defendant contends, the operator did everything he possibly could to avoid striking the decedent. Defendant's Mem. at 9-17. Plaintiffs, in contrast, contend that the train operator negligently failed to perceive and react to the situation in a timely manner, and failed to take the necessary and proper actions of sounding his horn, slowing, and stopping the train before it struck and killed decedent. Plaintiffs allege that Mr. Dixon's reactions were impaired by drugs. Plaintiffs' Memorandum of Points and

Authorities in Opposition to Defendant's Motion for Summary Judgment ("Plaintiffs' Mem.") at 9-17.

Plaintiffs' decedent was clearly a trespasser once she left the subway platform and jumped into the path of the train onto the subway tracks. *See Whitaker, supra.* A trespasser is "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." *Firfer v. United States*, 208 F.2d 524, 528 (D.C. Cir. 1953) (quoting Restatement of Torts, section 329 (1934)). When decedent jumped off the platform into the path of an oncoming train, she exceeded the scope of her status as a fare-paying passenger who was lawfully on the premises and she became a trespasser.

Trespassers may only recover from landowners for injuries that were "wilfully or wantonly inflicted, or caused by a hidden engine of destruction." *Washington Metropolitan Area Transit Authority v. Ward*, 433 A.2d at 1074; *Whitaker, supra.* The subway train that struck decedent was clearly not a "hidden engine of destruction." A "hidden engine of destruction" refers to devices such as spring guns used to protect property. *Mendelowitz v. Neisner*, 179 N.E. 378, 379 (N.Y. 1932).

Even if a jury could infer from the drug presence that the operator and, therefore, the defendant acted wilfully and wantonly, no reasonable jury could return a verdict for plaintiffs on the undisputed facts displayed here. The crucial issue in this case is whether the operator could have stopped the train before it struck and killed Devora Johnson. Based on the undisputed material facts, no reasonable juror could fail to conclude that the plaintiffs' decedent proximately caused her own death by jumping in front of the oncoming train when it was no more than 20 feet away from her, and that it would have been impossible for defendant or the operator, irrespective of any impairment from drug use, to stop the train after she jumped

onto the track and before the train struck her. *See* Affidavit of Joseph F. Krempasky ¶ 16. *Compare* Deposition of David Jay Schorr at 89 *and* Affidavit of David Jay Schorr ¶ 12.

As the train approached the Metro Center station, it was operating on an "automatic" computerized speed, and eye witnesses testify that Dixon put on the emergency brake immediately after decedent jumped. *See* Jordan Deposition at 9-10; Thompson Deposition at 13-15; *see also* Dixon Deposition at 41-42, 44-46. Plaintiffs offer no evidence to the contrary. All the eyewitnesses testify that decedent jumped when the train was from 4 to 20 feet away from her. No witnesses place the train farther than 20 feet from decedent. Defendant offers expert testimony that given the speed of the train when the emergency brake was depressed (15.65 miles per hour or 22.96 feet per second) and the distance required to stop it (157 feet), it was impossible to stop the train in the 20 feet or less available before hitting decedent. *See* Krempasky Affidavit ¶ 16. Plaintiffs' own expert concedes that the train could not have stopped if decedent jumped when she was within 20 feet of the train. *See* Schorr Deposition at 89.

Plaintiffs do not directly dispute the testimony that places decedent 4 to 20 feet away from the train when she jumped. Plaintiffs do, however, challenge this evidence on distance indirectly by offering statements of witnesses who testify that decedent laid on the train track for 5 to 15 seconds or more before she was struck. Richardo L. Moore testified that Devora Johnson lay on the tracks for approximately 10 seconds and perhaps for as many as 15 seconds before the train struck and killed her. Moore Deposition at 32-33. Ronald Thompson testified that after decedent jumped on the tracks, "[i]t seemed like 10 or 15 seconds, but it had to be maybe 5 to 10 seconds" before the train struck her. Thompson Deposition at 15. Plaintiffs' expert, Professor David Jay Schorr, testified that *if* decedent was on the tracks for 10 seconds or more before

the train struck her, a reasonably prudent train operator "should have been able to perceive and react to this danger by engaging the emergency braking system and should have been able to bring the train to a stop prior to the point of impact." Schorr Affidavit ¶ 12. Schorr also estimated that the train was in the station for more than ten seconds. *Id.* ¶ 19. Based on an estimated speed of 28.55 miles per hour (or 41.88 feet per second) just prior to the train entering the station, and the fact that the train was decelerating, Schorr estimated that the train would take at most 236.4 feet or 10.3 seconds to come to a stop under the train's emergency braking system. Schorr Affidavit ¶¶ 10, 12.

Schorr's conclusion that the train could have stopped before striking decedent is based on the assumption that decedent was on the track for 10 seconds or more before she was struck. However, the testimony offered by plaintiffs to support their allegation that decedent was on the track for 10 to 15 seconds or more before being struck is inherently incredible. Fifteen seconds would put the train back in the tunnel at the time decedent jumped, and no witnesses place it there. Indeed, no witnesses place decedent more than 20 feet from the front of the train when she jumped. Moreover, the very *same* witnesses who estimated that decedent was on the track for 5-15 seconds *also* testified that she was no more than 20 feet from the train when she jumped. Richardo Moore testified that decedent was only 10-12 feet from the front of the train when she jumped from the platform and that the train could not have stopped in time to avoid striking her. Moore Deposition at 26-28, 48-49, 74-75. Ronald Thompson also states that decedent was no more than 20 feet from the front of the train when she leaped from the platform into the train's path and that there was not enough time to stop the train before it struck her. Thompson Deposition at 12, 16-17, 67, 82. For example, to the extent that his estimates of time are inconsistent with his estimates of

distance, Mr. Thompson acknowledged that his estimates of time were the less reliable because of the way in which time seems to "slow[ ] down" when an accident is witnessed: "So to see it all you assume it was a little longer than it really happened." Thompson Deposition at 25.

Plaintiffs attempt to raise a material issue of fact by pointing to the testimony of witnesses who state that decedent was struck in mid-air. P ¶¶ 36, 41, 42, 45; D2 ¶¶ 36, 41, 42, 45. However, this testimony is consistent with testimony placing decedent no more than 20 feet from the train when she jumped in front of the train traveling at approximately 22 feet per second. D2 ¶ 45.

Although plaintiffs do not directly dispute the testimony that the train operator instantly pressed the emergency button after decedent jumped, or that this was the quickest way to stop the train, they allege that Mr. Dixon's reactions were impaired by drugs. However, plaintiffs' own expert, Dr. Booker, stated that impairment could not be determined from any of Mr. Dixon's test results. Booker Deposition at 59-60, 64. Dr. Booker also testified that he could not state positively that Mr. Dixon could have avoided the accident had it not been for his alleged drug use. *Id.* at 72. *See* discussion above at 8.

Moreover, even if it were conceded that the train operator was under the influence of drugs in violation of WMATA's rules and regulations, plaintiffs could still not prevail because no reasonable juror could conclude that *any* operator could have stopped the train between the time decedent jumped and the time she was struck. Thus no reasonable juror could find that any impairment of the train operator's faculties by the presence of cocaine and marijuana metabolites was a proximate cause of decedent's death or that the operator had a last clear chance to prevent this tragedy. The operator's use of drugs is either inadmissible (because of the lack of expert testimony indicating whether he was impaired or affected by drugs at

the time of the incident) or it would not support a verdict on proximate cause.

B. The Platform Issue

Plaintiffs contend that defendant breached a duty of reasonable care owed to decedent while she was lawfully on the train platform as an invitee. More specifically, they contend that defendant was negligent in knowingly permitting decedent to stand too close to the platform edge despite the fact that she was acting in a "strange" and "frightened" manner. *See* Plaintiffs' Mem. at 7-8, 14. In so doing, plaintiffs allege that WMATA personnel failed to fulfil their duty to be vigilant in protecting the safety of passengers. *Id.* at 8, 14. Plaintiffs also allege that the train operator was negligent in failing to sound his horn and slow the train as it entered the station. *Id.* at 9.

Defendant argues that its employees were not negligent in failing to prevent decedent from jumping into the path of an oncoming train. *See* Defendant's Memorandum of Points and Authorities in Reply to Plaintiffs' Opposition ("Defendant's Reply") at 2-4, 11. Defendant also argues that decedent assumed the risk by jumping off the passenger platform into the path of the train and was contributorily negligent as a matter of law. Defendant's Mem. at 17-20; Defendant's Reply at 12-13. Hence, even if the train operator and other WMATA personnel were negligent, plaintiffs' claims would be barred by decedent's own conduct.

On the evidence proffered, no reasonable juror could find that defendant was negligent because its employees failed to restrain the plaintiffs' decedent from jumping in front of the oncoming train while standing on the subway station platform. There is testimony that decedent did ask WMATA employee, Jo Ann Funderburk, on several occasions when the next train would arrive. There is also testimony that she "looked a little bit impatient" and had a "vague sort of look", a "very distant look." Thompson

Deposition at 9-10, 39. However, Karen Drew, who rode with and spoke to Devora Johnson from Friendship Heights to Metro Center had no inkling that decedent might attempt suicide and stated that decedent acted normally prior to jumping. Drew Deposition at 19, 30, 63-64. Ms. Drew testified further that "no one could have known she would jump in front of the train." *Id.* at 63-64. Moreover, it is undisputed that decedent did not tell anyone that she intended to commit suicide or intended to leap in front of an oncoming train.

Plaintiffs do not unequivocally assert, but rather guardedly suggest that "[i]t would appear that as the train was approaching the station, Devora Johnson was standing on the edge of the platform, talking to Jo Ann Funderburk", a WMATA employee. P ¶ 20. This is conspicuously not a statement that decedent was leaning into the track area so as to be in danger where she stood before she jumped. Moreover, examination of the underlying depositions cited by plaintiffs does not support their statement. Angela Wilson testified that decedent was standing on the orange brick next to the white line where the lights are. Wilson Deposition at 23-24. Decedent was talking to another woman who Wilson does not recall wearing a WMATA uniform. *Id.* at 22-23. Ronald Thompson testified that Jo Ann Funderbuck went into her duty position as the train approached, and that decedent stood with one foot on the orange tile and one foot on the white strip with the lights. Thompson Deposition at 41-42. Ms. Funderburk testified that Devora Johnson "did not say or do anything which would lead me to believe she intended to jump in front of the train." Funderburk Affidavit ¶ 4. Moreover, none of the eyewitnesses state that decedent was leaning over the edge of the platform at any time.

Plaintiffs contend that the train operator was negligent for not sounding the horn sooner presumably to warn decedent that the train was approaching. Some witnesses have testified, however, that the horn was blowing prior

to the train's arrival into the station. P ¶ 26; D ¶ 12. The train operator testified, however, that he did not sound the horn as he entered the station because no one was leaning over the edge of the platform or standing close enough to the edge to require him to sound his horn. Dixon Deposition at 36-37. There is no evidence that decedent ever leaned over the edge of the platform into the path of the train prior to the point at which she jumped in front of the train. Nor is there any question that she knew a train was coming when she jumped. At most, the horn would simply have alerted decedent to something that she already knew by her own observation and by the flashing lights at the edge of the platform. Any failure to blow the horn thus could not have been a proximate cause of decedent's death.

Given the evidence proffered, no reasonable jury could find that defendant was negligent because its employees failed to restrain the plaintiffs' decedent from jumping in front of the oncoming train. Moreover, decedent clearly assumed the risk and was contributorily negligent by jumping off the platform into the path of an oncoming train. *See Sinai v. Polinger Co.*, 498 A.2d 520, 525 (D.C. App. 1985); Restatement (Second) of Torts, section 496A comment d (1965). It is undisputed that plaintiff jumped in front of the train. She was not pushed or shoved; she did not stumble or trip or fall off the platform unintentionally. There is no evidence to suggest that she was unable to appreciate the natural and probable consequences of her own act. Decedent clearly contributed to her own injury by unreasonably and voluntarily encountering a known risk. She thus both assumed the risk and was contributorily negligent as a matter of law.

C. The Doctrine of Last Clear Chance

Plaintiffs argue that the doctrine of last clear chance is applicable to this case. Plaintiffs' Mem. at 19. As the Court

indicated in *Dean v. Century Motors*, 154 F.2d 201 (D.C. Cir. 1946):

> The doctrine presupposes a perilous situation created or existing through the negligence of both the plaintiff and the defendant, but assumes that there was a time after such negligence had occurred when the defendant could, and the plaintiff could not, by the use of means available, avoid the accident. It is not applicable if the emergency is so sudden that there is no time to avoid the collision, for the defendant is not required to act instantaneously.

Id. at 202 (footnotes omitted). Plaintiffs argue that defendant is liable in this case, regardless of any negligence on decedent's part, because it had the last clear chance to avoid the accident. Plaintiffs contend that the operator could have avoided the collision if he had exercised ordinary care. Defendant, in contrast, argues that the doctrine of last clear chance is inapplicable here because the doctrine requires that decedent be placed in danger by the negligence of *both* the decedent *and* the defendant and that defendant was not negligent or wanton or wilful. Defendant's Reply at 14-15. Defendant argues further that it was physically impossible for anyone in any condition to stop the train in the space and time available given its speed and proximity to decedent when she jumped.

Even assuming *arguendo* that defendant was negligent for failing to prevent decedent from throwing herself in front of the train, defendant would not be liable under the doctrine of last clear chance. As the undisputed evidence makes clear, no last clear chance existed because of the speed of the train and decedent's close proximity to it when she jumped. *See* discussion above at 11-15. The train operator acted reasonably in bringing the train to a stop in the quickest manner possible by promptly depressing

the emergency mushroom button after decedent jumped from the platform into the train's path. It was decedent's own jumping that created her danger and inevitably caused her death. There was no intervening avoidable cause.

Conclusion

The suicide of Devora Johnson is a tragedy, and the Court has great sympathy for her family. Her tragic death was not, however, proximately caused by any negligent or wanton and wilful conduct on the part of defendant. Defendant is thus entitled to a judgment as a matter of law. Accordingly, an Order filed on January 27, 1988 granted defendant's motion for summary judgment and dismissed plaintiffs' complaint.

/s/ Louis F. Oberdorfer

Date: February 5, 1988 UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-3110-LFO

ELEANOR T. JOHNSON, *et al.*,

Plaintiffs,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant.

FILED

JAN 27 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

This matter is before the Court on defendant's motion for summary judgment. The excellent memoranda and extensive oral arguments by counsel, supported by depositions and affidavits, have facilitated a prompt decision on the motion. Announcement of it, followed later by an explanatory memorandum, will spare the parties the labor and cost of further preparation for a complex (over 100 witnesses) trial. *See Whitaker v. WMATA*, C.A. No. 82-2771 (D.D.C. May 14, 1984), *aff'd mem.*, 804 F.2d 153 (D.C. Cir. 1986); *see also Edwards v. Consolidated Rail Corp.*, 567 F. Supp. 1087 (D.D.C. 1983), *aff'd mem.*, 733 F.2d 966 (D.C. Cir. 1984).

No reasonable jury could fail to conclude that the plaintiffs' decedent deliberately took her life by jumping

in front of the on-coming train when it was no more than 20 feet away from her, and that it would have been impossible for any train operator to stop the train before it struck her. *See* Affidavit of Joseph F. Krempasky, dated November 25, 1987 at ¶ 16. *Compare* Affidavit of David Jay Schorr, dated December 18, 1987 at ¶ 12 *and* Deposition of David Jay Schorr, dated December 4, 1987 at 89. No reasonable jury could conclude that any impairment of the train operator's faculties by the presence of cocaine and marijuana metabolites was a proximate cause of decedent's death or that the operator had a last *clear* chance to prevent this tragedy. Nor could any reasonable jury find that defendant was negligent because its employees failed to restrain the plaintiffs' decedent from jumping in front of the on-coming train while standing on the subway station platform. Accordingly, for reasons elaborated in a memorandum to be filed, it is this 27th day of January, 1988, hereby

ORDERED: that defendant's motion for summary judgment should be, and hereby is, GRANTED; and it is further

ORDERED: that the Complaint should be, and hereby is, DISMISSED, with prejudice.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7073

September Term, 1989

D.C. Civil No. 86-3110

ELEANOR T. JOHNSON, *et al.*,

Appellants

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

United States Court of Appeals
For the District of Columbia Circuit

FILED AUG 22 1989

CONSTANCE L. DUPRÉ
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: MIKVA, and RUTH B. GINSBURG, *Circuit Judges*, and HOGAN,* *District Judge*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupré
CONSTANCE L. DUPRÉ, CLERK

Date: 8-22-89
Opinion for the Court filed by Circuit Judge Mikva

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7073

September Term, 1989

CA 86-03110

Eleanor T. Johnson, et al.,

Appellants

v.

Washington Metropolitan Area Transit Authority

United States Court of Appeals
For the District of Columbia Circuit

FILED OCT 18 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Mikva and Ruth B. Ginsburg, Circuit Judges, and Hogan*, United States District Judge

ORDER

Upon consideration of appellee's Petition for Rehearing, filed September 20, 1989, it is

ORDERED, by the Court, that the Petition is denied.

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* of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

District Judge Hogan would grant the petition for rehearing.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7073

September Term, 1989

CA 86-03110

Eleanor T. Johnson, et al.,

Appellants

v.

Washington Metropolitan Area Transit Authority

United States Court of Appeals
For the District of Columbia Circuit

FILED OCT 18 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges, and Hogan*, District Judge

ORDER

The Suggestion For Rehearing *En Banc* of Appellee has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX G

EXTRACTS FROM WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY COMPACT, PUB. L. 89-774, 89TH CONG., 2ND SESS., S. 3488, NOVEMBER 6, 1966, 80 STAT. 1324, AS AMENDED.

ARTICLE V
GENERAL POWERS
ENUMERATION

12. In addition to the powers and duties elsewhere described in this Title, and except as limited in this Title, the Authority may:

(a) Sue and be sued;

(b) Adopt and use a corporate seal and alter the same at pleasure;

(c) Adopt, amend, and repeal rules and regulations respecting the exercise of the powers conferred by this Title;

(d) Construct, acquire, own, operate, maintain, control, sell and convey real and personal property and any interest therein by contract, purchase, condemnation, lease, license, mortgage or otherwise but all of said property shall be located in the Zone and shall be necessary or useful in rendering transit service or in activities incidental thereto;

(e) Receive and accept such payments, appropriations, grants, gifts, loans, advances and other funds, properties and services as may be transferred or made available to it by any signatory party, any political subdivision or agency thereof, by the United States, or by any agency thereof, or by any other public or private corporation or individual, and enter into agreements to make reimbursement for all or any part thereof;

(f) Enter into and perform contracts, leases and agreements with any person, firm or corporation or with any

political subdivision or agency of any signatory party or with the federal government, or any agency thereof, including, but not limited to, contracts or agreements to furnish transit facilities and service;

(g) Create and abolish offices, employments and positions (other than those specifically provided for herein) as it deems necessary for the purposes of the Authority, and fix and provide for the qualification, appointment, removal, term, tenure, compensation, pension and retirement rights of officers and employees without regard to the laws of any of the signatories;

(h) Establish, in its discretion, a personnel system based on merit and fitness and, subject to eligibility, participate in the pension and retirement plans of any signatory, or political subdivision or agency thereof, upon terms and conditions mutually acceptable;

(i) Contract for or employ any professional services;

(j) Control and regulate the use of facilities owned or controlled by the Authority, the service to be rendered and the fares and charges to be made therefor;

(k) Hold public hearings and conduct investigations relating to any matter affecting transportation in the Zone with which the Authority is concerned and, in connection therewith, subpoena witnesses, papers, records and documents; or delegate such authority to any officer. Each director may administer oaths or affirmations in any proceeding or investigation;

(l) Make or participate in studies of all phases and forms of transportation, including transportation vehicle research and development techniques and methods for determining traffic projections, demand motivations, and fiscal research and publicize and make available the results of such studies and other information relating to transportation; and

(m) Exercise, subject to the limitations and restrictions herein imposed, all powers reasonably necessary or essential to the declared objects and purposes of this Title.

ARTICLE XIV
LABOR POLICY
OPERATIONS

66. (a) The rights, benefits, and other employee protective conditions and remedies of section 13(c) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1609(c)), as determined by the Secretary of Labor shall apply to the operation by the Washington Metropolitan Area Transit Authority of any mass transit facilities owned or controlled by it and to any contract or other arrangement for the operation of transit facilities. Whenever the Authority shall operate any transit facility or enter into any contractual or other arrangements for the operation of such transit facility the Authority shall extend to employees of affected mass transportation systems first opportunity for transfer and appointment as employees of the Authority in accordance with seniority, in any non-supervisory job in respect to such operations for which they can qualify after a reasonable training period. Such employment shall not result in any worsening of the employee's position in his former employment nor any loss of wages, hours, working conditions, seniority, fringe benefits and rights and privileges pertaining thereto.

(b) The Authority shall deal with and enter into written contracts with employees as defined in section 152 of Title 29, United States Code, through accredited representatives of such employees or representatives of any labor organization authorized to act for such employees concerning wages, salaries, hours, working conditions, and pension or retirement provisions.

(c) In case of any labor dispute involving the Authority and such employees where collective bargaining does not

result in agreement, the Authority shall submit such dispute to arbitration by a board composed of three persons, one appointed by the Authority, one appointed by the labor organization representing the employees, and a third member to be agreed upon by the labor organization and the Authority. The member agreed upon by the labor organization and the Authority shall act as chairman of the board. The determination of the majority of the board of arbitration, thus established, shall be final and binding on all matters in dispute. If after a period of ten days from the date of the appointment of the two arbitrators representing the Authority and the labor organization, the third arbitrator has not been selected, then either arbitrator may request the Federal Mediation and Conciliation Service to furnish a list of five persons from which the third arbitrator shall be selected. The arbitrators appointment by the Authority and the labor organization promptly after the receipt of such list shall determine by lot the order of elimination and thereafter each shall in that order alternately eliminate one name until only one name remains. The remaining person on the list shall be the third arbitrator. The term "labor dispute" shall be broadly construed and shall include any controversy concerning wages, salaries, hours, working conditions, or benefits including health and welfare, sick leave, insurance or pension or retirement provisions but not limited thereto, and including any controversy concerning any differences or questions that may arise between the parties including but not limited to the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, and the interpretation or application of such collective bargaining agreements and any grievance that may arise and questions concerning representation. Each party shall pay one-half of the expenses of such arbitration.

(Subsections (d) and (e) are omitted)

ARTICLE XVI
GENERAL PROVISIONS

EXEMPTION FROM REGULATION

77. Except as otherwise provided in this Title, any transit service rendered by transit facilities owned or controlled by the Authority and the Authority or any corporation, firm or association performing such transit service pursuant to an operating contract with the Authority, shall, in connection with the performance of such service, be exempt from all laws, rules, regulations and orders of the signatories and of the United States otherwise applicable to such transit service and persons, except that laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing shall remain in force and effect; provided, however, that the Board may promulgate regulations for the safety of the public and employees not inconsistent with the applicable laws, rules, regulations or orders of the signatories and of the United States.

LIABILITY FOR CONTRACTS AND TORTS

80. The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit.

JURISDICTION OF COURTS

81. The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against the Authority and to enforce subpoenas issued under this Title. Any such action initiated in a State Court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended (28 U.S.C. 1446).

APPENDIX H

SUBSTANCE ABUSE POLICY AND EMPLOYEE ASSISTANCE PROGRAM

Elements of the Employee Assistance Program (EAP):

1. *Eligibility*

   — There will be two categories of employees who will be eligible for assistance under this Program.

   — *Category I* employees are those with alcohol or drug related problems who voluntarily request assistance.

   -- The Authority will not limit the number of times a Category I EAP participant may avail himself of the Program; however, an employee may be disqualified after multiple EAP referrals when the Joint Labor-Management Committee determines, upon appropriate medical advice that rehabilitation is not likely to be successful.

   — *Category II* employees are those who are subject to termination for off-duty use pursuant to Disciplinary Rule 3, and who request participation to preserve employment.

   — Category II employees will not be permitted to participate in the EAP more than once in any three year period in order to preserve employment. However, after successful completion of the EAP, a Category II employee may subsequently become a Category I participant and voluntarily seek assistance more than once within the three year period.

2. *Rehabilitation Procedures and Standards*

   — Actual Program procedures and standards will be determined by competent EAP Program experts.

- Program assistance will be out-sourced to established institutions and/or organizations chosen by Authority and Union officials. Administration of the Program will be by Authority employees with oversight by a specially appointed Joint Labor-Management Committee.

- There must be a minimum Program duration for Category II participants as follows:

Alcohol	-	30 days
Marijuana	-	90 days
Other Drugs	-	180 days

- Under appropriate circumstances, in cases where the employee was disciplined under Disciplinary Rule 6 for any drug presence for which the employee had a legitimate, but unreported prescription, the Medical Director may establish a minimum EAP duration of 30 days.

- These minimum program duration periods may be extended in individual cases by the Joint Labor-Management Committee upon advice of the Authority's Medical Department or by the Program agency.

3. *Conditional Employment While in EAP*

- Generally, Program participants will be eligible for "conditional employment" in non-safety sensitive jobs, subject to job availability and clearance by EAP Medical staff.

- Category I participants will continue their regular rate of pay during any period of conditional employment and will continue to accumulate classification seniority.

- Category II participants will be paid according to the wage rate of the job performed. Their seniority will be frozen effective the date of infraction, but it

will be recaptured without interruption effective the date of satisfactory completion of the EAP.

- Designated non-safety sensitive positions shall be exempt from the Labor Agreement provisions on posting and filling vacancies, bidding and bumping at any time when there are EAP participants eligible for such positions.

- Selection for available non-safety sensitive position vacancies will be determined by date of hire seniority, except the Category I participants are entitled to priority over Category II participants.

- Category II participants who are disciplined for use of drugs other than alcohol, marijuana or legitimate but unreported prescription drugs, are ineligible for conditional employment during EAP.

4. *Reinstatement Post-EAP*

   - Category I employees are entitled to reinstatement to their former job classifications upon successful completion of the EAP. If there is no vacancy, such employees will be permitted to "bump" immediately into the former job on the basis of seniority.

   - Category II employees will be eligible for reinstatement after successful completion of the EAP. Reinstatement will be made to the former job classification on the basis of seniority.

5. *Backpay and Benefits*

   - There will be no entitlement to backpay for any Program participants.

   - Category I participants will be entitled to use sick leave, vacation and leave of absence without pay for periods of EAP participation. They will also be entitled to continue participation in the Transit Employee Health and Welfare Fund Plan, and they will

continue to accrue benefits (such as leave accumulation, seniority and retirement) in accordance with the Labor Agreement, even when the employee does not qualify for conditional employment or where conditional employment is unavailable.

- Category II participations not conditionally employed will be entitled to continue participation in the Transit Employee Health and Welfare Fund Plan, provided they pay their own premium share and they shall continue to accrue Retirement Benefits provided they satisfactorily complete the EAP. Such employees can claim pay for accumulated vacation at the time of their release from pay status, but they shall not be entitled to receive pay for sick leave or any other benefits.
- Category I and II employees who receive conditional employment will participate in all benefits under the Labor Agreement for the duration of such work.

Disciplinary Rules:

1. *Use, Sale or Possession on Duty of Any Intoxicant (Drug or Alcohol)*

   — Immediate Termination

2. *Off-Duty Sale, Distribution or Possession with Intention to Distribute Illegal Drugs or Manufacture of Illicit Drugs Resulting in a Criminal Conviction*

   — Immediate Termination

3. *Use Off-Duty of Any Intoxicant with Detectable Presence in the Body as Indicated by a Post-Incident Medical Examination*

   A. For a presence of substances in the body system which is at or above the stipulated minimum levels, while on duty—

   First Offense

— Immediate release from pay status with a return to regular pay status only after satisfactory completion of EAP.

— Employee released from pay status will have ten (10) working days from notification of disciplinary action to enroll in the EAP. If that employee fails to enroll during that period, the employee will be terminated.

— Six month random testing period after reinstatement.

Second Offense

— Second offense of any detectable level within a three year period, with the exception of alcohol in which a level of .04 or more will be regarded as the minimum detectable level, will result in termination.

B. For a presence of substances in the body system which is below the stipulated minimum levels, while on duty—

First Offense

— 10 day suspension from duty.

— Detailed briefing on the EAP and the importance of participation and the certainty of discipline for future offenses.

— Six month random testing period.

Second Offense Within a Three Year Period

— Release from pay status with EAP option.

Third Offense Within Three Years From the Second Offense

— Termination.

4. *Stipulated Minimum Levels*

— Alcohol	- .05% in blood.
— Marijuana	- 5 ng/mL THC in blood or 10 ng/mL THC in blood plasma
— Any Other Drug	- Detectable level in urine or blood as confirmed by acceptable confirmation test.

5. *Testing*

— Post Incident Medical Test Policy.

— Urine and blood samples.

EMIT urine screen for marijuana and other drugs; if EMIT urine screen test positive—then blood is analyzed for THC levels as above.

— Blood test for alcohol.

6. *Physician Prescribed Intoxicants*

Employees required to use prescription drugs authorized by a licensed physician are responsible for being aware of any effect such drug may have on the performance of their duties and to report the use of such substances to their supervisor prior to reporting for work. When an employee does not comply with this requirement, a physician's prescription will not be an acceptable excuse for the use or possession of an intoxicant and the employee will be subject to discipline as set forth above.

7. *Definition of Intoxicant*

The term intoxicant includes, but is not limited to, ethanol (alcohol), amphetamines, barbiturates and other hypnotics, cocaine, narcotics (opiates such as heroin, morphine and codeine; methodone), PCP and other hal-

lucinogens, marijuana and any other cannabinoid (e.g., hashish). The term intoxicant also includes any other substance that alters one's senses or could affect one's ability to function in his or her job.